

GENTALI (MALAYSIA) SDN. BHD.

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v.

KAWASAKI SUNROCK SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR

DATO' R.K. NATHAN JC

[SUIT NO: D5-22-575-1995]

27 JUNE 1996

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CIVIL PROCEDURE: Preliminary objection - Failure to raise preliminary objection - Failure to object to opponent filing affidavit in reply out of time - Whether failure to object at earliest possible moment constitutes a waiver.

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CIVIL PROCEDURE: Default judgment - Setting aside - Failure to object to setting aside - Whether setting aside consented to - Whether appeal lies - Whether Court will still consider whether default judgment obtained regularly.

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CIVIL PROCEDURE: Documents - Discovery and inspection of documents - Rules of the High Court 1980, O. 24 - Summons for directions - Order 25 - Whether provisions only available after close of pleadings.

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CIVIL PROCEDURE: Discovery - Application for determination of issue before discovery - Whether barred - Disclosure of relevant document to enable defendant to file defence - Document already referred to by plaintiff in statement of claim.

CIVIL PROCEDURE: Discovery - Whether a creature of equity - Whether can be used as an engine of fraud - Rules of the High Court 1980, O. 92 r. 4 - Whether can be prayed in aid by party requiring document.

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CIVIL PROCEDURE: Pleadings - Further and better particulars - Rules of the High Court 1980, O. 18 r. 12 - Relevance of O. 25 para. 8 of Form 46 - Whether a mopping-up rule - Whether an abuse of process - Whether necessary to file affidavit.

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CIVIL PROCEDURE: Consent order - Setting aside - Whether necessary to file fresh application - Whether application to set aside can be brought to Court of first instance in original action.

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The plaintiff claimed, that by a sole distributorship agreement ('the agreement') dated 1 January 1991, the defendant had appointed the plaintiff as the sole distributor of the defendant's motorcycles and spare parts. The plaintiff alleged that the defendant had, thereafter, appointed persons other than the plaintiff

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a as distributors, in breach of the agreement. Consequently, the plaintiff brought the instant suit against the defendant claiming for, *inter alia*, start up and other costs incurred and loss of profits.

b The plaintiff's writ of summons together with its statement of claim was served on the defendant on 17 October 1995. The defendant entered appearance on 20 October 1995. The last day for the defendant to file its defence was 11 November 1995. On 24 October 1995, the defendant wrote to the plaintiff for an extension of time to file its defence. The defendant also requested a copy of the agreement. The plaintiff replied on 27 October 1995 requesting the defendant to comply with the Rules of the High Court 1980 ('the RHC').

c On 8 November 1995, the plaintiff wrote to the defendant requesting the defendant to file its defence within seven days from the date of the notice. On the same day, the defendant filed a summons-in-chambers praying for, *inter alia*, an order that the plaintiff do supply to the defendant a copy of the agreement. On 16 November 1995, the plaintiff entered final judgment against the defendant in default of defence. On 3 January 1996, upon the defendant's application, the Senior Assistant Registrar ordered, *inter alia*, that the judgment in default of defence obtained by the plaintiff be set aside, and that the plaintiff do supply the defendant with a copy of the agreement. The plaintiff appealed against the above-said orders.

d It was to be noted that the plaintiff was served with a copy of the defendant's application (to set aside the judgment in default of defence) and the supporting affidavit on 8 November 1995. However, the plaintiff's affidavit in reply was only served on the defendant on 29 December 1995. This delay was only raised for the first time during the defendant's submission. It was also found that the minutes in the Court file of the Senior Assistant Registrar's notes recorded that the plaintiff had no objection to the defendant's oral application to set aside the judgment in default of defence.

Held:

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g [1] Although the plaintiff's affidavit in reply was served on the defendant well beyond the 14 days provided for under O. 32 r. 13(2) of the RHC, this issue was not raised in any affidavit nor was it taken as a preliminary objection. Such a failure, on the part of the defendant, to register a protest at the earliest possible moment, ought to be construed as a waiver.

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i [2] The plaintiff's solicitor had, by stating that she had no objections to the judgment in default of defence being set aside, consented to it being so set aside; consequently, there could be no appeal on this ground. Once the Court finds, as a fact, that a plaintiff has consented to the setting

aside of a judgment in default of defence, the Court need not consider the issue of whether the said judgment was regular or irregular. *a*

[3] Although O. 24 (on discovery) and para. 8 of O. 25 of the RHC (on summons for directions) are the relevant provisions for obtaining relevant documents, the contention that these provisions are only available after the close of pleadings is a fallacious misconception of the law. *b*

[4] Whilst it is obvious that discovery becomes automatic upon the close of pleadings, there is no bar to a party applying for an issue to be determined before discovery (including the disclosure of a relevant document to enable a defendant to file its defence, more so when that particular document has already been referred to by the plaintiff in the statement of claim.) *c*

[5] Discovery was a creation of equity; it is, therefore, axiomatic that statutes cannot be used as an engine of fraud to defeat the interest of equity. Where it is obvious and plain, that a document is within the possession of a party which intends to rely on it in support of its case, and that the interest of justice will be best served if a copy of that document is disclosed to the opposing party, then O. 92 r. 4 of the RHC must lend a hand to assist the party requiring that document in obtaining it. *d*

[6] It was not wrong for the defendant to apply by way of summons-in-chambers for a copy of the agreement. Whilst a Court will be ever vigilant to see that such an application is not an abuse of the process, it must, with equal fervour, uphold a genuine application. After all, what is asked for is an exercise of the Court's inherent jurisdiction to ensure that justice prevails and that no party takes the other by surprise. *e*

[7] Order 25 of the RHC which provides for directions for trials, and which gives by way of para. 8 in Form 46 the right to apply for further and better particulars, is a mere mopping-up rule. In so far as a request for further and better particulars is concerned, the relevant rule is O. 18 r. 12 of the RHC. When there is a specific rule to follow, a defendant who attempts to avoid filing a summons and affirming an affidavit giving reasons why he wants those particulars, is abusing the process of the Court by resorting to Form 46 of O. 25 of the RHC. There is no need to file an affidavit pursuant to O. 25 of the RHC; whereas, it is otherwise if he pursues particulars pursuant to O. 18 r. 12. In the instant case, the plaintiff's reference to Form 46 of O. 25 of the RHC was totally without merit. Order 25 of the RHC provides for cases where, by inadvertence or otherwise, there has been non-compliance with O. 24 or O. 18 r. 12, and in which case para. 8 of Form 46 pursuant to O. 25 can apply. *f*

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a [8] The RHC shall not in any way limit or affect the inherent powers of the Court to make any orders as may be necessary to prevent injustice or an abuse of the process of the Court.

[9] The RHC have the force of statute and are not mere rules of practice.

b **Obiter dicta:**

[1] Once a consent order has been recorded, then unless again by consent such an order is agreed to be set aside, the only way a party can set aside the consent order is by filing a fresh action; no application ought or can be brought to the Court of first instance in the original action to set aside the consent order.

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[Plaintiff's appeal dismissed]

Cases referred to:

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Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23 FC (**refd**)

Tang Chok Ching v. Wong Ik Tieng & Ors. [1973] 2 MLJ 25 (**refd**)

R.H.M. Foods Ltd. v. Bovril Ltd. [1982] 1 All ER 673 CA (**refd**)

Gale v. Denman Picture Houses Ltd. [1930] 1 KB 588 (**refd**)

Bankers' Trust Co. v. Shapiro [1980] 1 WLR 1274 (**refd**)

Smith v. Peters [1875] 20 LR 511 (**refd**)

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Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd. [1984] 2 MLJ 143 (**fol**)

Lau Ming Hing Richard v. Bank Pembangunan Malaysia Bhd. [1994] 2 CLJ 849 (**refd**)

Government of Malaysia & Anor. v. Taib bin Abdul Rahman [1991] 2 CLJ 1101 (**fol**)

Cheow Chew Khoo (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman [1995] 4 CLJ 127 (**refd**)

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Legislation referred to:

Evidence Act 1950, s. 18

Legal Profession Act 1976, s. 56

Rules of the High Court 1980, O. 18 r. 12, O. 19 r. 9, O. 24 rr. 2(2), 2(5), 3, 4, O. 25 rr. 1, 8(5), O. 32 r. 13(2), O. 92 r. 4

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For the plaintiff - Lee Lim Huat; M/s. S.K. Yap & Ku Arzina

For the defendant - K. Sinniah; M/s. Chew, Wan & Co.

JUDGMENT

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R.K. Nathan JC:

Background Facts

By a sole distributorship agreement in writing dated 1 January 1991 (hereinafter referred to as 'the agreement'), the defendant appointed the plaintiff as the defendant's sole distributor for the defendant's Kawasaki CBU (Completely

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Built Up) motorcycles and spare parts (hereinafter collectively referred to as ‘the products’), in Malaysia upon the terms and conditions set out therein, in the agreement. **a**

The plaintiff contends that it was, *inter alia*, an express and/or implied term of the said agreement that the defendant would not appoint any other person save and except the plaintiff to act as the distributor of the products. On this basis the plaintiff set up an office and incurred expenses amounting to RM219,339. The plaintiff further contends that in breach of the said agreement the defendant appointed persons other than the plaintiff as distributors of the products and the plaintiff therefore claimed a total sum of RM6,127,779 made up as follows: **b**

(1) Start-up and other initial costs	RM219,339	c
(2) Loss of profits based on the profits ascertained for the years commencing 1 January 1993 to 31 December 1993 with a multiplier of 10 years	<u>RM5,908,440</u> RM6,127,779 =====	d
		e

There was also a claim for damages for breach of contract with interest and costs. The writ of summons with the statement of claim was served on the defendant on 17 October 1995. The defendant, through its solicitors, entered appearance on 20 October 1995. As the last date for filing the memorandum of appearance was 25 October 1995 the final date for the defendant to file the defence was 11 November 1995. On 24 October 1995 the defendant’s solicitors wrote to the plaintiff’s solicitors for an extension of time to file the defence. The plaintiff’s solicitors replied through their letter dated 27 October 1995 requesting the defendant’s solicitors to comply with the Rules of the High Court 1980 (‘RHC’). On 8 November 1995 the plaintiff’s solicitors wrote to the defendants solicitors pursuant to s. 56 of the Legal Profession Act 1976 requesting the defendant’s solicitors to file the defence within seven (7) days from the date of the said notice. **f**

In the meantime, the defendant on 8 November 1995 by way of a summons-in-chambers made an application (written application) to the Court asking for, *inter alia*, an order that the plaintiff do supply to the defendant a copy of the agreement referred to in the statement of claim. The said application was fixed for hearing on 3 January 1996. **g**

Since the defendant failed to comply with the request to file the defence pursuant to the plaintiff’s solicitors’ letter dated 8 November 1995, the plaintiff **h**

Since the defendant failed to comply with the request to file the defence pursuant to the plaintiff’s solicitors’ letter dated 8 November 1995, the plaintiff **i**

- a* entered final judgment against the defendant on 16 November 1995. On 3 January 1996 the learned Senior Assistant Registrar (SAR) heard the defendant's written application and in the course of the proceedings directed the defendant's solicitor, Kunna Sinniah, to make an oral application ('oral application') to set aside the final judgment in default of defence obtained by the plaintiff on 16 November 1995.
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The learned SAR then made the following orders:

- (a) that the judgment in default of defence obtained by the plaintiff be set aside (hereinafter referred to as 'the 1st order');
- c* (b) that the plaintiff do supply to the defendant a copy of the agreement dated 1 January 1991 referred to in the statement of claim (hereinafter referred to as 'the 2nd order'); and
- (c) the defendant to file in the statement of defence within 14 days upon receipt of the copy of the said agreement (hereinafter referred as 'the 3rd order').
- d*

This is the appeal before me against the orders made by the learned SAR on 3 January 1996.

Appellant's Case

- e* The appellant submits that where a judgment in default is regularly obtained, it cannot be set aside without the defendant showing that there is substantial merit in the defence. Whilst conceding that pursuant to O. 19 r. 9 of RHC the Court may vary or set aside the judgment, the appellant argued that the discretion given to the Court, must be exercised in accordance with well-known principles. The appellant relied on *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 FC where Raja Azlan Shah CJ (Acting) (as His Highness then was) said at p. 24:
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- g* The rule gives the Court a discretion which must be exercised judicially. It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits.

Further reliance regarding merits was placed on *Tang Chok Ching v. Wong Ik Tieng Ors.* [1973] 2 MLJ 25 where Gill FJ said at p. 26:

- h* ... It is true that the Court has an absolute discretion to set aside even a regular judgment, but the Court's discretion must be exercised in accordance with the settled principle that if the judgment is a regular judgment, then it is an almost inflexible rule that there must be an affidavit of merits stating facts showing a substantial ground of defence.
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Notwithstanding the fact that the above two cases referred to judgments obtained in default of appearance, it was submitted that the principles regarding the exercise of the Court's discretion remained the same. *a*

The 1st order of the learned SAR was attacked on the basis that the oral application was unsupported by any affidavit showing substantial defence and that therefore the said order ought to be set aside. *b*

With regard to the 2nd order made by the learned SAR the appellant argued that before a Court could exercise any discretion, it must first be cloaked with such discretion or power and that with regard to the rules regulating pleadings and matters related thereto, nothing was clearer than the provisions of the RHC. It was the contention of the appellant that at the stage the proceedings were at, none of the parties was entitled to any document or copy thereof from the other. There was, it was submitted, nothing in the RHC or anywhere else that gives such right to the defendant to make the application to the Court for such an order. *c*
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The nearest provision possibly available to the defendant was contained in O. 24 RHC (relating to discovery) and para. 8 of Form 46 relating to summons for directions pursuant to O. 25 of the RHC. In any event, it was the submission of the appellant that these two avenues were as yet unavailable to the defendant as both O. 24 and O. 25 of the RHC were applicable only after the close of pleadings which, it was argued, meant that the defence must be filed and served before an application under O. 24 or O. 25 can be made. The Court therefore had no jurisdiction to make the 2nd order. And since the 3rd order was dependent on and consequential to the 1st and 2nd orders, this too ought to have been refused. The appellant thus prayed that the appeal be allowed with costs. *e*
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Respondent's Case

The respondent submitted that consequent to the granting of the orders prayed for in the written application, the learned SAR granted the order in respect of the oral application to set aside the judgment in default of defence. At para. 3 of the statement of claim the plaintiff had pleaded that they would produce a copy of the said agreement at the trial of the action. Further, the plaintiff had relied on the contents of the agreement to contend that no one else ought to be appointed as the distributor except the plaintiff. In the circumstances, since the defendant did not have a copy of the said agreement they were of the view that a copy of the said agreement ought to be given to them before they filed the defence. *g*
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The defence submits that since there was no response to their letter dated 24 October 1995 seeking extension of time to file the defence the defendant's *i*

- a* solicitors spoke to one Ku Arzina, a solicitor for the plaintiff, on 20 October 1995 requesting for a copy of the said agreement and since there was no response the defendant sent another letter dated 7 April 1995 by way of facsimile to the plaintiff and affirmed that there was no reply to the said letter too. Since the last date for filing the defence was 1 November 1995, the
- b* defence conceded that they filed the written application on 8 November 1995. The written application was supported by the affidavit of K. Sinniah, the Counsel having conduct of this case. The said affidavit exhibited a letter KMS-1 from the plaintiff's solicitors to the defendant dated 8 August 1995 (issued prior to the filing of this writ) complaining that the defendant had breached the terms of the agreement as constituted in a letter of appointment dated
- c* 1 January 1991 and that as a consequence thereof the plaintiff had incurred a total loss of RM5,908,446 and demanded the said sum from the defendant. The said affidavit also stated that the defendant had informed its solicitors that the defendant did not have a copy of the alleged letter dated 1 January 1991 and had directed the said solicitors to obtain a copy from the plaintiff's solicitors.
- d* The defendant's solicitors then by way of their letter dated 15 August 1995 wrote to the plaintiff's solicitors for a copy of the said agreement. The affidavit further contained an averment that the said K. Sinniah had, soon after sending the letter dated 15 August 1995 to the plaintiff's solicitors, spoken to one S.K. Yap, the plaintiff's solicitor then in charge of this matter and had explained
- e* to her that the defendant's officer, a Japanese, who had handled this matter, had left for Japan and that the alleged letter of appointment was not in their possession. It was submitted by the defence that even after hearing of this predicament the plaintiff's solicitors refused to give a copy of the said letter or the agreement but directed the said solicitor to get it from the defendant
- f* directly. The said letter dated 15 August 1995 too was not replied. Soon thereafter, the plaintiff filed and served this writ. Upon entering appearance the said K. Sinniah then spoke to Ku Arzina on 20 October 1995 requesting for a copy of the said agreement. Since there was no response the defendant's solicitors then sent another letter dated 24 October 1995 referred to earlier,
- g* seeking a copy of the said agreement. Since there was no response to this letter too the defence sent another letter dated 7 November 1995 again seeking extension of time to file the defence until after receipt of the said agreement. It thus became necessary for the defendant to file the said written application. By then judgment in default of defence had already been taken on
- h* 16 November 1995.

- In response to K. Sinniah's affidavit in support of the application, Ku Arzina Ku Alit affirmed an affidavit dated 28 December 1995 in which she said that she had on 26 October 1995 informed the defendant to file the defence within the time stipulated and that by their letter dated 8 November 1995 they had
- i* given notice that if no defence was filed within the next seven days judgment

in default would be entered. Alternatively the plaintiff's solicitors alleged that "it" was not provided for by the RHC and the "it" presumably referred to the defendant's written application. *a*

However, only in its submission the defendant made a very pertinent allegation that although the plaintiff's solicitors were served with a copy of the defendant's written application on 8 November 1995 and were informed that the hearing of the said application was on 3 January 1996 yet the plaintiff's affidavit in reply was only affirmed on 28 December 1995 and served on them on 29 December 1995, i.e. one week short of two months rather than within the 14 days, pursuant to O. 32 r. 13(2) RHC. Since this issue was not raised in any affidavit, nor was it taken as a preliminary objection I am of the view that the conduct of the defendant in failing to register a protest at the earliest possible moment, and to have taken this objection only at submission stage, ought to be construed as a waiver. *b*
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The Hearing Before the Learned SAR *d*

At the outset the plaintiff's solicitors objected to the defendant's application on the grounds that the RHC did not provide for such an application by the defendant. The defendant relied on O. 92 r. 4 of the RHC.

The learned SAR upon hearing arguments gave an order in terms of the written application. *e*

The Setting Aside of the Judgment in Default of Defence – the 1st Order of 3 January 1996

The question then arose before the learned SAR as to the effect of the judgment in default of defence that had been taken by the plaintiff on 16 November 1995 without the defendant's knowledge. The defence submitted before the learned SAR that since the last date for filing the defence was 11 November 1995 and since on 8 November 1995 the said written application was served on the plaintiff's solicitors, the plaintiff ought not to have entered judgment in default of defence. Since the application to Court had been made within the time prescribed for the filing of the defence, the defence submitted that the plaintiff had abused the process of the Court by taking in default judgment. This, therefore, contended the defendant, was an irregular judgment which ought to be set aside *ex debito justitiae*. *f*
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Plaintiff's Solicitors Consenting to the Judgment Being Set Aside

When asked by the learned SAR to reply to the defence submission to set aside the judgment, the minutes in the Court file of the learned SAR's notes show that Ku Arzina replied as follows: *i*

Saya tidak bantahan penghakiman ditepikan.

a It was therefore submitted that by stating that she did not have any objections to the judgment being set aside, the plaintiff's Counsel in fact had consented to it being set aside for irregularity and that there could therefore be no appeal on this.

b ***The 2nd Order dated 3 January 1996***

This order was for the plaintiff to supply the respondent with copy of the agreement dated 1 January 1991 referred to in para. 3 of the statement of claim.

c I totally reject the appellant's submission in respect of this order. Whilst it is true that O. 24 which relates to discovery and para. 8 of O. 25 relating to summons for directions are the relevant provisions for obtaining relevant documents, the contention that these provisions are only available after close of pleadings is a fallacious misconception of the law.

d Order 24 is reproduced herewith:

1(1) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action.

e (2) Nothing in this Order shall be taken as preventing the parties to an action agreeing to dispense with or limit the discovery of documents which they would otherwise be required to make to each other.

f It is clear that discovery of documents between parties to an action with pleadings, is automatic upon the close of pleadings except in cases relating to running down action r. 2(2) and medical negligence (see O. 25 r. 8(5)). However in relation to actions not covered by automatic close of pleadings O. 24 rr. 3 and 4 will apply. In other words it is obvious that whilst upon close of pleadings, discovery becomes automatic, there is no bar to a party applying for an issue to be determined before discovery including the disclosure of a relevant document to enable the defendant to file the defence, more so when that particular document had already been referred to by the plaintiff in the statement of claim as in this case.

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h It must be remembered that discovery was a creation of equity and it is axiomatic therefore that a statute cannot be used as an engine of fraud to defeat the interest of equity. Where it is obvious and plain that a document is within the possession of a party which intends to rely on that document in support of its case and that the interest of justice would be best served if a copy of that document is disclosed to the opposite party then O. 92 r. 4 must

i lend a hand to assist the party requiring the document, to obtain it.

In fact the Court has a wide discretion when to order discovery in the interest of justice. However in *R.H.M. Foods Ltd. v. Bovril Ltd.* [1982] 1 All ER 673 CA, the Court of Appeal held that it is generally inexpedient and unnecessary to do so until the issues have been defined by the pleadings. But as in this case reference has been made to an agreement incorporated in a letter of appointment (exh. KMS-1). However para. 3 of the statement of claim refers to an agreement. The defendant says he needs either a copy of this letter or the agreement in order to file his defence. Surely O. 24 r. 2(5) ought to lend its benign hand to assist the defendant herein. In *Gale v. Denman Picture Houses Ltd.* [1930] 1 KB 588 the Court of Appeal said that it will not, save in very exceptional circumstances, order a defendant to produce documents in her possession before the plaintiff had delivered his statement of claim. In *Bankers' Trust Co. v. Shapiro* [1980] 1 WLR 1,274 the plaintiffs claimed to have been defrauded by customers of the defendant bank and they applied contemporaneously with the issue of the writ, for immediate disclosure by the bank of the accounts and of all documents and correspondence with the customers, relating to those accounts. The Court of Appeal held that the equitable remedy of discovery was necessary to enable the plaintiffs to trace the whereabouts of their money and in view of a strong *prima facie* case of fraud, ordered discovery.

As to whether the proper mode of applying was effected in this case, I find nothing wrong with the defendant applying by way of a summons-in-chambers for a copy of the said agreement. Whilst a Court will be ever vigilant to see that such an application is not an abuse of the process, it must with equal fervour uphold a genuine application. After all what is asked for is an exercise of the Court's inherent jurisdiction to ensure that justice prevails and that no party takes the other by surprise.

Form 56 of O. 25 r. 1

I wish to dwell on this form. Paragraph 8 of Form 46 pursuant to O. 25 r. 1 reads as follows:

8. The plaintiff serve on the defendant within ... days the further and better particulars of the statement of claim specified in (the document served with) the defendant's notice under this summons.

It would seem that by virtue of para. 8 of Form 46 the defendant can apply for directions for the plaintiff to give further and better particulars of the statement of claim and that Form 47 provides for the defendant to give a notice stating the directions he requires.

It is my view that O. 25 which provides for directions for the trial and which gives by way of para. 8 in Form 46 a right to apply for further and better particulars is a mere mopping-up rule.

- a* In so far as a request for further and better particulars is concerned, the relevant rule is O. 18 r. 12. When there is a specific rule to follow, a defendant who attempts to avoid filing a summons and affirming an affidavit giving reasons why he wants those particulars, is abusing the process of the Court by resorting to Form 46 of O. 25. There is no need to file an affidavit pursuant to O. 25 whereas it is otherwise if he pursues for particulars pursuant to O. 18 r. 12. In any event, it is my considered view that the appellant's reference to Form 46 of O. 25 in this case is totally without merit. I had used the words "mopping-up" earlier in respect of O. 25 para. 8. In my view O. 25 provides for cases where by inadvertence or otherwise there had been non-compliance with O. 24 or O. 18 r. 12 and in which case para. 8 of Form 46 pursuant to O. 25 could apply.
- c*

Application of O. 92 r. 4 of RHC

- d* The Rules of the High Court shall not in any way limit or affect the inherent powers of the Court to make any orders as may be necessary to prevent injustice or an abuse of the process of the Court. In *Smith v. Peters* [1875] 20 LR 511 Sir G. Jessel MR, in holding that a Court has jurisdiction to make any interlocutory order which is reasonably asked as ancillary to the administration of justice at the hearing, said at pp. 512-513:
- e* The first question that I have to consider is, whether this application is in accordance with the practice of the Court. I have no hesitation in saying that there is no limit to the practice of the Court with regard to interlocutory applications so far as they are necessary and reasonable applications ancillary to the due performance of its functions, namely, the administration of justice at the hearing of the cause. I know of no other limit. Whether they are or are not to be granted must of course depend upon the special circumstances of the case. But if authority were wanting for my guidance in this matter – and I think the principle is so clear that authority is not wanting – I might refer to the case which has been mentioned by the plaintiff's Counsel, of *Kynaston v. East India Company* (3 Sw. 248), which was an application in a tithe suit to inspect the defendant's house before the hearing, in order to ascertain its value. The object in ascertaining its value would be to make a decree against the defendant at the hearing. Here the object of ascertaining the value is also to make a decree against the defendant at the hearing. What does Lord Eldon say? "I have found no case in point, but on principle I think the Court has authority." Therefore, in deciding the question of practice, he only looked at the principle. That is what I am going to do.
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- Nearer home I need to refer only to the erudite judgment of Edgar Joseph Jr. J (as his Lordship then was) in *Pacific Centre Sdn. Bhd. v. United Engineers (Malaysia) Bhd.* [1984] 2 MLJ 143 wherein in respect of O. 92 r. 4 RHC his Lordship's resounding expression of his opinion is echoed as follows at p. 148:
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I might add, in passing, that I do not consider that there is any substance in the submission that O. 92 r. (4) of the Rules of the High Court is purely a rule of practice. The Rules of the High Court were enacted in exercise of the powers conferred by s. 70 of the Courts of Judicature Act 1964, with the consent of the Chief Justices of Malaya and Borneo and the Rules Committee and are comprised in P.U. (A) 50 which is clearly subsidiary legislation within the meaning of s. 3 of the Interpretation Act 1967. The Rules in my opinion, therefore, have statutory force and are not mere rules of practice. In the result, I hold that there is jurisdiction by virtue of inherent powers to grant *Mareva* injunctions in this country.

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I totally adopt and uphold this view and therefore hold that even by virtue of O. 92 r. 4 of RHC the defendant was entitled to apply by way of a summons-in-chambers for a copy of the said agreement.

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What the plaintiff is asking, is for the defendant to simply file a defence, even to the extent of denying the existence of the agreement. The defendant then, pursuant to O. 24 and after automatic close of pleadings is entitled to seek discovery. Upon receipt of the document pursuant to discovery, the defendant will then *ex necessitate* apply to amend the defence. If pleadings had been closed pursuant to O. 34 of the RHC then again an amended bundle of pleadings would have to be filed.

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On the other hand it is also possible for the plaintiff, as soon as a defence is filed denying the existence of this letter or agreement dated 1 January 1991, to apply for summary judgment by disclosing the said letter or agreement or even to apply to strike out the defence.

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It is clear to me that all these procedures can be averted by making the order the learned SAR did. Justice in this case has been seen to be done. In an adversarial system of justice, such as ours, no litigant ought to be allowed to take an unfair advantage over his opponent and this Court will never condone or allow for such an act.

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The Consequential 3rd Order of 3 January 1996

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Having made the 1st order giving the defendant a right to have a copy of the said agreement referred to by the plaintiff in his statement of claim it is logical and a matter of course for the learned SAR to make the 2nd order, i.e. giving leave to the defendant to file the defence within 14 days from the date of receipt of the said agreement.

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The Oral Application to Set Aside – the 1st Order of 3 January 1996

I have checked the learned SAR's minutes of proceedings before him on 3 January 1996 and I note that the learned SAR had written the following:

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a **Arzina:**

Saya tiada bantah penghakiman diketepikan.

In the circumstances, the **1st order** made by the SAR on 3 January 1996 (emphasis provided) was to set aside the judgment.

b It is clear and beyond question that the judgment in default of defence was set aside with consent. Even though the learned SAR had not written the words by consent, by implication I cannot but concur with the learned SAR that the setting aside was by consent. On this very same issue Chong Siew Fai J (as his Lordship then was) said in *Lau Ming Hing Richard v. Bank Pembangunan Malaysia Bhd.* [1994] 2 CLJ 849; [1994] 2 MLJ 323:

c Although the said order dated 21 July 1984 does not expressly state on it that it was made by consent, there can be no denial that it was a consent order. This is clear from the notes of proceedings (exh. 1 annexed to Megat Zabidi's first affidavit) relating to the bank's application for summary judgment during which George Lo of Mark Foong & Co., acting for Lau, stated on 21 July 1984 that his client (Lau) had no objection to the application. That being so, the omission to state in the order that it was made by consent does not affect the fact that it was so made.

d Once a consent order has been recorded then, unless again by consent such an order is agreed to be set aside, the only way a party can set aside a consent order is by filing a fresh action and no application ought or can be brought to the Court of first instance in the original action, to set aside the consent order. I need only to refer to *Lau Ming Hing (supra)* wherein a fresh suit was filed to set aside a consent order. In *Government of Malaysia & Anor. v. Taib bin Abdul Rahman* [1991] 2 CLJ 1101; [1991] 2 MLJ 174 SC, the then Supreme Court held that the consent order could only be set aside by a fresh action. The arguments of the appellant that the judgment was a regular judgment is of no consequence in the light of the appellant Counsel's consent to set aside the judgment. Once I find as a fact that the appellant had consented to the setting aside of the judgment, I need not consider the issue as to whether the judgment was regular or irregular.

e In any event for completeness I wish to add that once the plaintiff's solicitors were served with the written application on 8 November 1995, they ought not to have obtained the judgment in default of defence on 16 November 1995. The least they should have done was to inform the Court by way of a letter or an affidavit, of the existence of the application and to leave it to the learned SAR to decide whether he wished to give judgment in default of defence in spite of the written application. I recall to mind the judgment of V.C. George JCA (as he then was) in *Cheow Chew Khooon (t/a Cathay Hotel) v. Abdul*

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Johari bin Abdul Rahman [1995] 4 CLJ 127; [1995] 1 MLJ 457 wherein he said: *a*

I pause to exhort registrars to be particularly careful in considering draft default judgments presented to the Court and to have in mind that they are submitted without the other side having been given an opportunity of scrutinising it. The registrar has to ensure not only that the judgment sought to be entered is for what the plaintiff is entitled to but that in fact there is default. *b*

One final note on the conduct of Counsel. Once there is an admission by a Counsel, and upon which admission the Court had precipitated a course of action that was a natural and consequential result of such an admission, then it is totally improper for that Counsel or anyone acting for and/or in his place to contend that there was no such admission, when the Court's records show such an admission. Certainly at the least such an admission is admissible under s. 18 of the Evidence Act 1950 being an admission by the Counsel representing the plaintiff. *c*

In the circumstances, I dismissed this appeal with costs and fixed an early date for the hearing of this matter to 18 July 1996. On 23 April 1996 I dismissed the appellant's application for stay. *d*

Reported by Isaac TJ Lee &
Gan Peng Chiang *e*

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